



Yale Human Rights and Development Law Journal

Volume 11

Issue 1 *Yale Human Rights and Development Journal*

Article 11

2008

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Recommended Citation

Adrienne Bernhard, Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. (2008).

Available at: <https://digitalcommons.law.yale.edu/yhrdlj/vol11/iss1/11>

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Response

Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*

Adrienne Bernhard[†]

I. INTRODUCTION

Efforts to deter corporate crime have been thwarted by difficulties in identifying and apprehending perpetrators, and in determining appropriate terms for liability. Sara Seck's article, "Home State Responsibility and Local Communities: The Case of Global Mining," offers an important commentary on the question of corporate social responsibility in a global era, and the corporation's relationship to state sovereignty, international relations, and extraterritorial jurisdiction. Drawing on Canada as a case study, Seck attempts to establish clear legal norms and processes that would hold Canadian corporations accountable for human rights violation¹ She argues that the implementation of home state regulation in Canada (and elsewhere) will provide strong incentives for Canadian mining companies to conduct their overseas business ventures in socially and environmentally responsible ways.²

In Part II, I will summarize Seck's argument, focusing on her proposal to pursue corporate violations abroad through home state jurisdiction. In Part III, I will evaluate Seck's proposal, considering the benefits and drawbacks to this approach toward promoting accountability for corporate crimes. In Part IV, I offer my own alternative to home state regulation: the establishment of an international court that has jurisdiction over corporate crimes. I conclude by proposing a realistic assessment of promoting

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1. Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 YALE HUM. RTS. & DEV. L.J. 177, 181 (2008).

2. *Id.*

accountability for corporate crimes committed overseas. Because Seck's argument is expansive, I will limit my focus of this response to the question of jurisdiction over corporate crimes and what forum would most effectively address them.

II. THE NEED TO ADDRESS CORPORATE CRIME

Seck provides a brief overview of the Canadian Government's Standing Committee on Foreign Affairs and International Trade (SCFAIT), which examined allegations that Canadian mining companies had committed human rights violations in developing countries.³ She begins with a discussion of nationality and territoriality as preliminary justifications for the exercise of home-state regulation, and acknowledges the difficulties posed by extraterritorial application of its justiciability.⁴

Seck's call for increased home state accountability is compelling for its identification of the need to curb corporate abuses through law. Her illustration of situations in which states can legitimately exercise extraterritorial jurisdiction over crimes committed by their nationals would be made even stronger if further developed to include the economics of home state regulation. Despite a conscientious agenda, Seck's ideal of "full implementation of the three pillars of participation rights"⁵ does not thoroughly address the financial stakes of home state regulation. In an era of globalization with growing corporate interest in emerging markets and foreign investment,⁶ the question of jurisdiction is crucial not only to the protection of human rights but also to the overseas operation of businesses. Whether Canada should implement legislation to ensure that corporate wrongdoers are held legally accountable in Canadian courts is not the only question we should pose. Rather, I suggest that it would be an effective and efficient endeavor to explore whether governments could and should defer to an international court with the power and the authority to hold corporate wrongdoers accountable.

My response to Seck's article attempts to treat the problem of jurisdiction she articulates as a complicated global initiative, and posits the institutionalization of internationally agreed-upon procedures to deal with corporate crimes through the advent of an International Corporate Criminal Court (ICCC).⁷ I emphasize that this alternative is not a rebuttal to Seck's proposal but rather a supplemental proposal that should be considered alongside it. Domestic courts are certainly one possible

3. *Id.* at 179-81.

4. *Id.* at 187-92.

5. *Id.* at 206.

6. See, e.g., NICOLA JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS 5-9 (2002) ("[C]orporations involved in international trading . . . are major actors in the processes of globalisation. . . . Because of the economic power of these entities and their ability to invest in other countries they can force a country, competing for foreign direct investment, to lower its standards.").

7. I am grateful to Zachary D. Kaufman for helping me develop the idea of an international court to address corporate crimes.

mechanism to confront corporate crimes committed abroad. However, an ICCC—if such a court could be created and endowed with adequate resources and enforcement powers—would be a more successful forum, or at least a helpful backstop in cases where domestic courts are unwilling or unable to address corporate crimes.⁸

III. EVALUATION OF SECK'S ARGUMENT

Explanations and exculpations for corporate crimes demand a serious examination of the occupational and organizational structures that may have enabled criminal conduct. Seck should be credited with identifying a critical problem of corporate accountability and proposing a means for addressing it; however, while she identifies the urgency of a home state regulation program, Seck bases her argument on the idea that the individuals or cases subject to host state jurisdiction have been clearly identified and/or that home state governments would be willing and able to enforce their claimed jurisdiction.⁹ In doing so, she does not make explicit the groups or individuals that can be prosecuted, in what circumstances, and for what sorts of crimes; furthermore, readers are left to wonder whether Seck's chief concern is civil liability, criminal liability, or both. Finally, Seck fails to provide convincing evidence for the effectiveness of home state jurisdiction.

Initially, Seck asserts the validity of a home state's jurisdiction based on that state's overwhelming number of connections to the host state: as examples of these "territorial points of control," she mentions "stock exchanges, financial institutions and enabling corporate laws, as well as specific support mechanisms associated with services provided by export credit agencies and trade commissioners."¹⁰ Even if they are compelling default judicial forums, do home states truly have the ability to advance a global regime of human rights, to define its scope, or to apply that regime to multinational corporations abroad, simply because they are financially supportive of or otherwise related to the foreign satellite offices of domestically-based corporations?

Seck later wields the territoriality principle as a justification for *host* state regulation, reasoning that it gives legal authority for a state to exercise jurisdiction in a case due to the location of the crime.¹¹ This system of home-state-versus-host-state claims works well when there is a clear line of

8. See generally WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 415 (2007) ("The existence of international crimes and the recognition of individual responsibility for such crimes logically suggests that there should be an international tribunal with power to try individuals for the commission of international crimes. It is just as important to have an international criminal court to administer international criminal law as it is to have national criminal courts to administer national criminal law. For however objective and impartial national courts in fact may be, because they are courts of particular states there will inevitably be a suspicion of bias when a national court tries an international criminal . . .").

9. Seck, *supra* note 1.

10. *Id.* at 189.

11. See *id.*

demarcation between the two state jurisdictions, and prosecutions may be initiated in the appropriate court. But laws and rules are not always so straightforward, and disagreements can arise when both states may claim jurisdiction.¹² Perhaps Seck implicitly acknowledges this ambiguity when she brings up concurrent jurisdiction as another mitigating possibility for home state regulation.¹³ In her explanation of the dilemma of concurrent jurisdiction—whereby two authorities both have a credible claim to jurisdiction over a particular crime—Seck rightly points out that “a critical question in the extractive industries context is how to address potential problems that might arise in the exercise of concurrent jurisdiction over non-egregious human rights violations.”¹⁴

Although her identification of the phenomenon of concurrent jurisdiction is appropriate in the context of a discussion about home state regulation, Seck does not resolve the consequences that inevitably accompany such a dilemma. If neither the home state nor the host state can agree on jurisdiction, universal jurisdiction will not necessarily suffice as a panacea.¹⁵ Working against her own claims, Seck offers hypothetical examples that are precisely the kind of situations in which two states would be unlikely to agree—for instance, a situation in which the host state worries that the home state will be lenient on its nationals.¹⁶ Even if culpability could be identified, a home state might not want to defer the prosecution of a case to a host state if the home state did not trust the host state’s justice system to be fair. For example, after declaring that the Sudanese government complicit in the Darfur genocide,¹⁷ the U.S. government would likely be reluctant to allow Sudanese courts to prosecute Americans suspected of committing crimes in Sudan. Finally,

12. See, e.g., Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349, 349 (“Extrapolating from the Rwandan case, the Article points to areas of difficulty and potential friction—particularly, but not only, including the distribution of defendants—that are likely to arise in regimes of concurrent national and international jurisdiction.”).

13. See Seck, *supra* note 1, at 192.

14. See *id.* at 194.

15. See, e.g., Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFF., July-Aug. 2001, at 86 (arguing that universal jurisdiction violates state sovereignty and creates political and legal chaos). Kissinger argues that “an excessive reliance on universal jurisdiction may undermine the political will to sustain the humane norms of international behavior so necessary to temper the violent times in which we live.” *Id.* at 96. According to Kissinger, since any number of states could set up such universal jurisdiction tribunals, the process could quickly degenerate into politically driven show trials to attempt to place a quasi-judicial stamp on a state’s enemies or opponents. *Id.* at 92. But see Kenneth Roth, Response, *The Case for Universal Jurisdiction*, FOREIGN AFF. Sept.-Oct. 2001, at 150, 150 (responding directly to Kissinger by arguing that his “objections [to universal jurisdiction] are misplaced, and the alternative he proposes is little better than a return to impunity”).

16. Seck, *supra* note 1, at 194. Cf. GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 95 (1991) (citing an instance where Swiss officials detained a French national because they believed that “if he were to be released there was a serious risk that he might flee to France from where extradition would be impossible and where there was no guarantee that he would be prosecuted for the offences committed in Switzerland.”).

17. Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A1.

Seck's proposal may produce unintended consequences that undermine the economic activities she identifies or the legal regimes she proposes. If a home state aggressively pursued corporate crimes committed overseas, corporations might relocate their headquarters to jurisdictions that do not threaten to hold corporations accountable for crimes they commit abroad. Alternatively, corporations may retain the location of their front offices but limit or eliminate their activities abroad, thus reducing their potential for expanding the market for their goods and services.

I list these possibilities to illustrate the importance of states' identities to their particular bilateral relationships, which inform their own potential experience with concurrent jurisdiction. Seck insists that concurrent jurisdiction over corporate malfeasance is quite common, but she may underestimate the nature and number of conflicts that overlapping jurisdiction can cause. None of these outcomes is desirable from the perspective of either the home state or the host state, especially if corporations are providing the host state with critical foreign investment and profits back home.

As a final justification for home state regulation, Seck cites universal jurisdiction, which contends that the responsibility to police corporate crimes is *erga omnes*, or an "obligation" as she refers to it.¹⁸ While some may optimistically believe that corporations privilege public accountability, transparency, and enlightened self-interest, the reality is that the "choice" of underdeveloped countries not to adopt such stringent human rights standards may stem from their desire to attract foreign investment. Seck's argument raises some significant questions: first, do developing countries have a legitimate interest in determining their own policies? Second, what transnational regimes are reasonable to employ in order to monitor and restrain corporations irrespective of the territory in which they operate? Finally, is Seck's proposal of home state regulation tantamount to a mobilization of the "developed" legal systems of rich countries in order to police and sanction corporate practices in places where it is impractical or impossible to invoke local law? A Canadian corporation, for example, would likely be reluctant to subject itself to a universal regime of human rights, or to operate under a mandate of enforceable responsibility, if the economic stakes were set too high. Indeed, the first section of Seck's article is entitled "Home State Reluctance."¹⁹ Additionally, Seck concedes that "[m]any matters of concern to local communities impacted by global mining are not violations of international criminal law or matters of universal jurisdiction, but rather concern the realization of indigenous or local community rights."²⁰ Consequently, because domestic courts have different priorities than indigenous peoples, universal jurisdiction is not necessarily an effective means to address international corporate crimes.

18. See Seck, *supra* note 1, at 200. See also LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 39 (2003) (discussing the concept of *erga omnes*).

19. See Seck, *supra* note 1, at 181.

20. *Id.* at 194.

Seck's argument alternately raises concerns about the implications of imposing one country's legal regime on another or appealing to the tenets of universal jurisdiction, which are typically reserved for the most heinous crimes, such as genocide, war crimes, crimes against humanity, and other atrocities. Certainly, states and their corporations have an obligation to behave ethically and to uphold stringent safety and human rights codes, but how does that obligation translate into law? Once codified, this law has the potential to raise doubts about the appropriateness or effectiveness of trying such cases in the domestic courts of nations with little connection to the crimes charged. Furthermore, Seck does not consider that legal policy in corporate culpability must be based on a systematic analysis of corporate decision-making that sets out factual patterns or deterrence strategies; a normative argument alone probably will not motivate companies to change their actions.²¹

IV. ALTERNATIVE PROPOSAL: AN INTERNATIONAL CORPORATE CRIMINAL COURT DESIGN

Recognizing that Seck is correct to point out the absence of an effective means to address corporate crimes, I propose an alternative to the problematic solution she offers. In this part, I will first discuss the design of an international court that has jurisdiction over corporate crimes and then present both benefits and drawbacks to such an institution.

An alternative to Seck's proposal is the trial of individuals and corporations in an International Corporate Criminal Court (ICCC). The creation of a new tribunal for corporate crimes is potentially more viable than home state jurisdiction, and superior to expanding the jurisdiction of an existing tribunal. I refer to the International Criminal Court (ICC) as a model.²² Like the ICC,²³ the ICCC would be designed to provide redress for particularly egregious offenses, as well as crimes for which states are unlikely to hold their citizens or corporations accountable: violation of safe conduct, child labor practices, widespread and long-lasting environmental damages, forced relocation, fraud, direct cooperation between corporations and oppressive regimes, and corruption. If a corporation is charged with violating these articulated international laws, it could be held liable by the court, even if a host or home state objects. The ICCC would be a transnational judicial body that identifies corporate malpractice while

21. The debate over legalism versus voluntarism features elsewhere in this volume. See, e.g., Matthew Genasci & Sarah Pray, *Extracting Accountability: Implications of the Resource Curse on CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L.J. 37 (2008) (arguing that both voluntary and mandatory CSR models are problematic in addressing sustainable development).

22. The ICC was established by a treaty concluded in Rome, Italy, in mid-1998. See Rome Statute of the International Criminal Court, *adopted and opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

23. The jurisdiction of the ICC "shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." *Id.* art. 5.

acknowledging that corporate self-regulation and voluntary displays of responsibility cannot always suffice as a guide to corporate practice.

There are growing attempts to envision and develop blueprints for regulating multinational corporations (MNCs) by subjecting them to a set of universal standards that will apply to corporations above and beyond the demands of any specific locality. Attempts at this level include pressures on global and regional bodies such as the United Nations (U.N.), the European Union (EU), and the World Bank to develop enforceable regulatory frameworks subjecting MNCs to standards of operation that can be systematically monitored, assessed, and, when necessary, enforced.²⁴

In fact, hundreds of businesses have already expressed an interest in forging a system of corporate culpability. Consider the United Nations Global Compact, a framework for businesses that have pledged to align their activities with multiple universally accepted principles concerning human rights, labor, the environment, and anti-corruption.²⁵ The Global Compact claims that, “[a]s the world’s largest, global corporate citizenship initiative, the Global Compact is first and foremost concerned with exhibiting and building the social legitimacy of business and markets.”²⁶ Seck has clearly delineated that there are coordination problems inherent in resolving corporate wrongdoing, and I propose building on existing efforts, like the United Nations Global Compact, to address these problems through a transnational solution that would supplement domestic efforts.

A. Establishment

The ICCC could be created by the U.N. Security Council (UNSC), which would craft the Court’s statute, rules, and procedures (affording suspects commonly respected guarantees of due process) and select its senior staff, including judges and chief prosecutor. The Court could either be permanent or ad hoc, after the model of the U.N. International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY).²⁷ Staffing would be left to the determination of the UNSC: states would have the power to nominate individuals, and an election would follow. Such a transparent selection process organized by a recognized world body would augment the institution’s legitimacy.

When the government of the state in which the alleged crime occurred is not authentically representative, or its domestic judicial system is incapable of sitting in judgment of the crime, the ICCC would have the

24. Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635, 637 (2004).

25. United Nations Global Compact, <http://unglobalcompact.org/AboutTheGC/index.html> (last visited June 10, 2008). See also RICHARD D. HARTLEY, CORPORATE CRIME 111 (2008) (providing additional information on the structure and principles of the United Nations Global Compact).

26. United Nations Global Compact, *supra* note 25.

27. The United Nations Security Council established the ICTY and the ICTR in 1993 and 1994, respectively. See Statute of the International Tribunal, May 25, 1993, 32 I.L.M. 1192; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602.

power to try the crime. The ICC could draw on the ICC as a model in multiple ways. For one, the same standards and options for initiating or referring cases could be employed. As with the ICC,²⁸ the UNSC could refer cases to the ICC or the chief prosecutor could employ her *proprio motu* powers to initiate an investigation. Additionally, as with the ICC, the ICC might only try cases if domestic jurisdictions were “unwilling or unable.”²⁹

B. Benefits of an ICC

There are several advantages to an ICC over a domestic court trying corporate crimes.³⁰ An international court established to address corporate crimes would reduce the start-up and transaction costs inherent in creating or expanding the jurisdiction of domestic courts to try these types of crimes. The ICC would have dedicated, recognized experts on staff who would likely provide a higher level of authority to address corporate crimes. By concentrating the world’s resources into a single court to address corporate crimes, the ICC would promote burden sharing and establish a focal point for coordination among the various states that might be involved in, effected by, or even just concerned with corporate crimes. The ICC’s credibility as a judicial body would be high (and, crucially, higher than many domestic courts) because it would be set up by the United Nations and staffed by recognized experts in the field of corporate activities and international law. Over time, as the ICC heard cases, it would develop a body of knowledge and precedent, deepening and broadening the expertise of its staff and the future understanding of matters involving corporate social responsibility.

C. Drawbacks of an ICC

My proposed solution may not be any more feasible than Seck’s theory; indeed, difficulties abound in trying to create an International Corporate Criminal Court. For example, in contrast to state courts—and similar to the ICC, ICTR, and ICTY themselves³¹—the ICC may not have strong

28. See Rome Statute, *supra* note 22, art. 13.

29. *Id.* art. 17 (“[T]he Court shall determine that a case is inadmissible . . . unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . .”). This aspect of the Rome Statute is popularly known as the “complementarity principle.” See, e.g., Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT’L L. 121 (2005) (analyzing the characteristics of the complementarity principle).

30. This paragraph draws upon the literature on neoliberal institutionalism, an international relations theory that contends that international institutions promote interstate cooperation. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (2005) (arguing that international regimes facilitate decentralized cooperation among self-interested actors).

31. International war crimes tribunals are often criticized for not being able to enforce their arrest warrants. See, e.g., Han-Ru Zhou, *The Enforcement of Arrest Warrants By*

enforcement mechanisms. Consequently, the ICCC would need to rely on state support to apprehend suspects and impose sentences.

As with other international courts, the ICCC could be criticized for not sufficiently acknowledging victims' interests or the preferences of indigenous populations.³² On the other hand, the ICCC would be no worse than a home state jurisdiction that usurped jurisdiction over a host state and also did not include victims or indigenous populations in its process and decision-making. Furthermore, if the ICCC shared the ICC's complementarity principle, then the government of the territory in which the crimes allegedly occurred or the government of the nationality of the suspected criminal would first be able to try the corporate crimes, and the ICCC would only exercise its power if said state were "unwilling or unable." Through this mechanism, indigenous populations could still participate in the process of promoting accountability for corporate crimes committed against them.

V. CONCLUSION

Seck is to be commended for raising our awareness about corporate crimes and the challenges of addressing them. Perhaps her proposal for home state regulation is a more effective solution than a potentially impotent, idealistic international court, given the political realities of the international arena. At the very least, the problem of corporate crime is serious enough that the proposals Seck and I offer are both worth thorough consideration.

International Forces: From the ICTY to the ICC, 4 J. INT'L CRIM. JUST. 202, 203 (2006) (observing that "enforcement remains public international law's longstanding Achilles' heel" and arguing that the ICTY needed to rely upon NATO to execute arrest warrants because states would not cooperate with the ICTY and the UNSC would not act decisively).

32. The ICTR has suffered criticism for having an ineffective outreach program. See, e.g., Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950, 955 (2005) ("Despite some progress with limited resources, the [Rwandan] Tribunal's outreach efforts have been sorely lacking, with the result that most Rwandans still know little if anything about trials in Arusha").

